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IN THE

Supreme Court of the United States

October Term, 1942.

No. 723.

INTERNATIONAL ELEVATING COMPANY,
Appellant,

vs.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and JOSEPH BERGEN.

BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

NATHANIEL L. GOLDSTEIN,
Attorney General, State of New York.

ORRIN G. JUDD,
Solicitor General.

WILLIAM GERARD RYAN,
FRANCIS R. CURRAN,
Assistant Attorneys General,
Of Counsel.

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BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

Scope of this Brief.

The questions presented by this case, concerning the constitutionality and applicability of the New York Unemployment Insurance Law in respect to maritime workers, are substantially similar to those raised in the three other cases in which the Industrial Commissioner is an appellee, namely:

Standard Dredging Corporation v. Frieda S. Miller as Industrial Commissioner, etc. and Mike Cassaretakis—October Term, 1942, No. 722.

Matton Steamboat Co., Inc. and Conners Marine Co., Inc. v. Frieda S. Miller as Industrial Commissioner, etc. and James R. Knowlson—October Term, 1942, No. 783.

Lake Tankers Corporation v. Frieda S. Miller as Industrial Commissioner, etc. and Jamel Sheredos—October Term, 1942, No. 813.

Our main brief in No. 783 not only sets forth our contentions in respect of the primary issues of constitutionality and interpretation in this case, but also deals with the counter-arguments advanced in all four of the cases. We submit a short separate brief in this case in order to deal with matters peculiar to the case at bar.

Opinions Below.

The opinion of the Court of Appeals of the State of New York (R. 60-69) is reported in 289 N. Y. 119, and reversed the decision of the Appellate Division of the Supreme Court of the State of New York, Third Department (R. 69-70), reported in 262 App. Div. 654, which rendered no opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under § 237, as amended, of the Judicial Code (28 U. S. C. A. § 344).

Questions Presented.

The questions presented on the merits of this appeal are (1) whether the application of the New York Unemployment Insurance Law to one engaged in maritime employment within the State of New York contravenes Article III, § 2, of the United States Constitution and, (2) if not, whether Congress has affirmatively acted so as to deprive the State of jurisdiction to tax maritime employers.

Statement.

Appellant's brief, on pages 2 and 3, fails to state all the facts which have been found by the Unemployment Insurance Appeal Board (R. 3-5) and affirmed by the Court of Appeals (R. 61).

The additional facts which we consider important are as follows:

The grain elevators on which Appellee Bergen worked transferred grain in bulk between ocean going vessels and canal boats or other boats (R. 4). During 1938 and 1939 his work was the storing and trimming of grain in the holds of the ships (R. 4). Bergen was a member of a local union of the International Longshoremen's Association.

Appellant had a closed shop agreement with said union and only members of the union worked on the grain elevators. Compensation for the services of the union members was measured by a predetermined fixed scale of $5.00 for each thousand bushels handled. The trimmers usually met in a union meeting room on South Street in the City of New York, and if a job was available, all would proceed from the meeting room to the job (R. 4).

Bergen did not perform any work on the grain elevator until it had been tied up alongside the steamer and the harbor vessel between which the transfer of grain was to be effectuated. Occasionally, after one job was done there was another job to be done on a vessel tied up at a different pier. In that event, Bergen had his choice of proceeding by land to the other job or remaining on the grain elevator and being transported thereon, in which event

he did not participate in the navigation of the vessel (R. 4).

Bergen's work was all performed under the supervision of a superinendent in appellant's employ and not under the supervision of the captain of the grain elevator (R. 4).

While the boat was under way from one pier to another, it was then under the supervision of the captain of the vessel, who was a licensed individual (R. 4).

Bergen did not sign any ship's articles. He was not fed on the ship, and when he went to lunch he had to go to a restaurant situated on the shore. Bergen lived in the Borough of Brooklyn and went home to his residence every night. He worked eight hours a day and any work done thereafter was considered overtime. On a few rare occasions when Bergen was too tired to go home, he slept on the floor of the boat, as there were no sleeping accommodations on the boat (R. 4-5).

Appellant has conceded that the greater part of the work performed by Bergen in 1938 and 1939, prior to June 3, 1939, was in the State of New York, and that the base of operations after June 3, 1939, was in the State of New York (R. 5).

Unlike Knowlson, Appellee in No. 783, Appellee Bergen was not a member of the crew of the vessel. The Unemployment Insurance Appeal Board affirmed the decision of the Referee (R. 8), who had found that Bergen was not an officer nor a member of the crew of the vessel (R. 13). The Court of Appeals held Bergen was not a member of the crew (R. 62).

Statute Involved.

The statute involved is the New York Unemployment Insurance Law[1] (Labor Law §§500, *et seq.*). The pertinent sections of the statute in force during 1938 and 1939 are annexed as an appendix to our main brief, No. 783. No question concerning the construction of the statute, as distinguished from its constitutionality as construed, is present in this case, since the holding of the Court of Appeals that it applies to the particular maritime worker is binding as a decision of State law.

> "The construction given to a statute of a State by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." (*Leffingwell v. Warren*, 2 Black 599, 603).

See, also:

Lloyd v. Matthews, 155 U. S. 222;
Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U. S. 673.

The reference which appellant makes (Brief, pp. 5, 23-27) to an early opinion of the New York Attorney General (1936 Op. Atty. Gen. 268) which was based entirely upon the supposed compulsion of the *Knickerbocker*[2] and *Dawson*[3] cases, is therefore of no present significance.

No question of inequity exists by reason of the Court of Appeal's reversal of the Attorney General's 1936 opinion, because the legislature has provided that no taxes shall be collected with respect to wages paid prior to January 1,

[1] L. 1935 c. 468, and as amended, effective June 3, 1939, by L. 1939, c. 662.
[2] 253 U. S. 149.
[3] 264 U. S. 219.

1942 to officers or members of crews of vessels (N. Y. Laws 1943, c. 454). The claimant's right to unemployment benefits, which gave rise to this proceeding, has not been affected, however.

Summary of Argument.

The main points of law involved in this appeal are argued by us in companion case No. 783 (*Matton Steamboat Co., Inc. and Conners Marine Co., Inc. v. Frieda S. Miller, as Industrial Commissioner of the State of New York, and James R. Knowlson*). We respectfully refer to our brief in that case, of which copies are being furnished to counsel in this case.

POINT V.

Since Bergen was not a member of the crew, the Federal Unemployment Tax Act exempting from the Federal Tax Service performed as an officer or member of the crew of a vessel is not applicable, and appellant is left with the sole argument that the State law contravenes Article III, § 2, of the Federal Constitution.

Appellant has substantially withdrawn those parts of its Assignment of Errors (2-5) which relate to the Court of Appeals holding that claimant was not a member of the crew of a vessel (Brief, footnote, p. 8). Although part of the arguments based on the *Jensen*[1] case still apply, the concession which appellant has made removes one of the main arguments of appellants in the other cases.

The only Assignment of Error now relied upon by appellant and urged in its brief is that the application of the

[1] 244 U. S. 205.

New York State Unemployment Insurance Law to maritime employers and employees violates the provisions of Article III, §2 of the Constitution of the United States.

We have proved in our main brief No. 783 under Point II that the state law does not contravene Article III, §2 of the Federal Constitution. Since Bergen was not a member of the crew the provisions of the Federal Unemployment Tax Act advanced by appellants in No. 783 as barring the State from applying the Unemployment Insurance Law to a member of the crew, do not apply in this appeal.

We submit that if our legal arguments are sound, that the State Law does not contravene Article III, §2, of the Federal Constitution, then obviously the State has jurisdiction in the case at bar where Bergen was not a member of the crew.

CONCLUSION.

The Order Appealed From Should be Affirmed.

Albany, N. Y., April 28, 1943.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York.

Of Counsel
ORRIN G. JUDD,
Solicitor General of the State of New York.

WILLIAM GERARD RYAN,
FRANCIS R. CURRAN,
Assistant Attorneys General.